

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Administrative Law Judges
Washington, DC 20460

In the Matter of)	
)	
David Petrocco Farms, Inc.,)	Docket No. FIFRA-08-2003-0012
14110 Brighton Road)	
Brighton, Colorado 80601)	
Respondent)	

Federal Insecticide, Fungicide and Rodenticide Act-Written Warning-Preponderance of Evidence

The preponderance of evidence established that David Petrocco Farms as a private applicator received a written warning in accordance with FIFRA § 14(a)(2) and thus could be assessed a penalty within the limitations of that section for violations occurring subsequent to receipt of the warning.

Federal Insecticide, Fungicide and Rodenticide Act-Worker Protection Standard-Incorporation By Reference-Use Of A Registered Pesticide Inconsistent With Its Labeling-Preponderance Of Evidence

The record established that between July 12, 2002, and August 10, 2002, David Petrocco Farms made 220 applications of 22 registered pesticides identified in the complaint. Labels on each of these pesticides incorporated by reference the Worker Protection Standard (WPS), 40 C.F.R. Part 170. The preponderance of evidence established that at the time of an EPA inspection on August 8, 2002, David Petrocco Farms was not displaying a record of information about pesticide applications made within the last 30 days while workers were on the establishment as required by the WPS, 40 C.F.R. § 170.122, at a central location as required by § 170.135(d). Each separate application of a registered pesticide while workers were on the establishment and information about pesticide applications made within the last 30 days was not displayed as required by WPS is a use of a pesticide in a manner inconsistent with its labeling and thus a violation of FIFRA §12(a)(2)(G).

Federal Insecticide, Fungicide and Rodenticide Act-Use Of A Pesticide Inconsistent With Its Labeling-Unit Of Violation-Dependent Violations

Where in addition to counts alleging use of registered pesticides in a manner inconsistent with their labeling for failure to comply with the display requirements of the WPS, Complainant alleged in separate counts for the same applications use of a pesticide inconsistent with its labeling for applications at rates in excess of that permitted by the label or on a crop not permitted by the label, it was held that the unit of violation was “use” of a registered pesticide in a manner inconsistent with its labeling for which only one penalty per application could be assessed. Moreover, Complainant has not sustained its burden of proof as to these additional counts and, in any event, the ERP makes it clear that these are dependent violations for which only one penalty per application may be assessed

Federal Insecticide, Fungicide and Rodenticide Act-Private Applicator-Debt Collection Improvement Act-Maximum Penalty

Although the Agency apparently intended to increase the maximum penalty for a single violation by a private applicator subsequent to receipt of a written warning, or a citation for a prior violation, from \$1,000 as provided by FIFRA § 14(a)(2) to \$1,100 for violations occurring on or after January 30, 1997, as authorized by the Debt Collection Improvement Act of 1996, Agency was bound by rule as published, 61 Fed. Reg. 69364 (December 31, 1996) and thus maximum penalty of \$1,000 per violation was unchanged, 40 C.F.R. § 19.4 (2002-2004).

Federal Insecticide, Fungicide and Rodenticide Act-Use Of A Registered Pesticide Inconsistent With Its Labeling-Determination Of Penalty-Enforcement Response Policy-WPS Penalty Policy

Proposed penalty for violation of regulation requiring display of pesticide application information made within the last 30 days while workers were on the establishment computed in slavish adherence to ERP and WPS Penalty Policy rejected as too high, because it overstated the gravity of the harm, attributing benefits to the display of pesticide application information in reducing the risk or potential risk of worker exposure to pesticides which the record did not support. Nevertheless, a substantial penalty was justified because it must be presumed that the WPS is valid and that compliance with the display requirement will reduce the risk to workers of pesticide exposure. A penalty of \$114,400 was determined to be appropriate and was assessed.

Appearances:

For Complainant:

Eduardo Quintana, Esq.
Enforcement Attorney
U.S. EPA
Denver, Colorado

and

Kathy M. Clark, Esq
Toxics and Pesticides Enforcement Division
U.S. EPA
Washington, D.C.

For Respondent:

John D. Faught, Esq.
John Faught & Associates, P.C.
Denver, Colorado

And

Randy L. Sego, Esq
Randy L. Sego, L.L.C.
Denver, Colorado

Initial Decision

This proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (“FIFRA”), 7 U.S.C. § 1361(a), was commenced on June 3, 2003, by the filing of a complaint by the Office of Enforcement, Compliance and Environmental Justice, U.S. EPA, Region 8, charging Respondent, David Petrocco Farms, Inc. (“Petrocco”) with 229 counts of use of registered pesticides inconsistent with their labeling in violation of Section 12(a)(2)(G) of the Act. The complaint alleged, inter alia, that Petrocco operates a farm located at 14110 Brighton Road, Brighton, Colorado, where it grows various fruits and vegetables, that in the course of its planting and growing activities Petrocco applies registered pesticides and as to such applications is a “private applicator” as defined in FIFRA § 2(e)(2), that the labels on 22 identified pesticides used by Petrocco Farms incorporated the Worker Protection Standard, codified at 40 C.F.R. Part 170, and that Petrocco violated such standard subsequent to receiving a Written Notice of Warning (“NOW”) contemplated by FIFRA § 14(a)(2). For these alleged violations, it was proposed to assess Petrocco a penalty totaling \$231,900.

Petrocco answered, alleging, inter alia, that the complaint should be dismissed because Petrocco had not violated any provision of FIFRA subsequent to receiving a written warning from the Administrator, denying that it was properly served with any written warning of the alleged violations, denying the alleged violations, contesting the amount of the penalty as excessive and unwarranted, and requested a hearing. Thereafter, Petrocco filed a motion to amend its answer to the complaint as to paragraphs 101, 113, 191 and 227, which was granted. The original answer had admitted that Petrocco had applied the pesticides identified in these paragraphs at specified locations, while the amended answer denied in whole or in part the applications on the dates alleged.

Thereafter the parties exchanged prehearing information in accordance with an order of the ALJ and filed a series of motions. Rulings on these motions included granting the parties’ respective motions to supplement prehearing exchanges, granting Complainant’s motion to exclude witnesses, granting Respondent’s motion to amend its answer, denying Complainant’s motion to dismiss certain affirmative defenses, denying Respondent’s motions to dismiss and granting Complainant’s motion to compel Respondent’s compliance with prehearing order.

A hearing on this matter was held in Brighton, Colorado, during the period April 5 through April 7, 2004. Based upon the entire record including the proposed findings, conclusions and briefs of the parties, I make the following:

Findings of Fact

1. David Petrocco Farms, Inc is a corporation organized under the laws of Colorado and a person as defined in Section 2(s) of FIFRA. Additionally, David Petrocco Farms is a private

applicator as defined in FIFRA § 2(e)(2).¹

2. David Petrocco Farms, Inc. (“Petrocco Farms”) is the operator of an “agricultural establishment”² with a place of business located at 14110 Brighton Road, Brighton, Colorado. Petrocco Farms grows various vegetables including onions, cabbage, lettuce, spinach, kale and collard greens, peppers, turnips, green beans, red beets and sweet corn . Although Petrocco Farms’ overall operation is large, vegetables with the exception of cabbage and sweet corn are grown on very small plots in order to meet the needs of its customers for fresh produce (Tr. 704-05).

3. In the course of its growing and planting activities, Petrocco Farms finds it necessary to apply registered pesticides to control insects and plant diseases. These pesticides, by trade name and registration number, include:

Ambush, EPA Reg. No. 10182-18;
 Ammo, EPA Reg. No. 379- 3027;
 Asana XL, EPA Reg. No.352-515;
 Avaunt, EPA Reg. No. 352-597;
 Confirm, EPA Reg. No. 707-238;;
 DiPel DF, EPA Reg. No. 275-103
 Dimethoate; EPA Reg. No.51036-110;
 Di-Syston, EPA Reg.No. 3125-307;
 Dithane F45, EPA Reg. No.707-156;
 Ecozim (Amvac AZA 3% EC) EPA Reg. No. 5481-476;
 Lannate, EPA Reg. No.352-384;
 Larvin, EPA Reg. No. 264-379;
 Nu -Cop, EPA Reg. No. 51036-269;
 Manex, EPA Reg. No. 1812-251;
 Proclaim, EPA Reg. No. 100-904;
 Provado, EPA Reg. 3125-457;
 Pyronyl, EPA REG. No.655-498;
 Spin Tor, EPA Reg. No.62719-294;
 Serenade, EPA Reg. No. 69592-7;

¹Section 2(e)(2) defines “private applicator” as follows:

The term “private applicator” means a certified applicator who uses or supervises the use of any pesticide which is classified for restricted use for purposes of producing any agricultural commodity on property owned or rented by the applicator or the applicator’s employer or (if applied without compensation other than trading of personal services between producers of agricultural commodities) on the property of another person.

². An agricultural establishment is defined as any farm, forest, nursery, or greenhouse (40 C.F.R. § 170.3).

Sevin XLR, EPA Reg. No.264-333;
Thiodan, EPA Reg. No. 279-2924;
Warrior T, EPA Reg. No. 10182-18.

Ambush, Ammo, Asana XL, Di-Syston, Lannate, Larvin, Proclaim and Warrior from the above list are restricted use pesticides meaning, inter alia, that the pesticides may be applied only by or under the supervision of a certified applicator. The labels on each of the referenced pesticides (C's Exhs 9-30) incorporate the Worker Protection Standard (40 C.F.R. Part 170).

4. During the peak harvesting season, Petrocco Farms employs approximately 250 people, the majority of whom are seasonal field workers. Approximately 20 of Petrocco Farms' employees are permanent or year-around.

5. On September 20, 2001, David Petrocco Farms, Inc., 14110 Brighton Road, Brighton, Colorado, was inspected by Ms. Britta Campbell, now Ms. Britta Copt, an EPA environmental protection specialist, to determine compliance with the Worker Protection Standard (Tr. 114; Report on Inspection, C's Exh 1). Ms. Copt was accompanied on the inspection by Eddie Sierra, an interpreter, who at the time was the Director for Planning and Targeting, EPA Region 8 (Tr. 118).

6. Ms. Copt and Mr. Sierra arrived at Petrocco's offices on the date and at the address mentioned in the preceding finding at approximately 2:00 pm. (Tr. 117, 120; Notice of Inspection, C's Exh 1b). They approached a building, described by Ms. Copt as the "main office building" (photo, R's Exh A), which had two doors, one on the right marked "Employees Only", and the one on the left marked "Shipping and Receiving" (Tr. 117-18). They entered through the door marked Shipping and Receiving and asked for Mr. Joe Petrocco.

7. Ms. Copt and Mr. Sierra met Mr. Petrocco, who identified himself as "Co-director", and presented their credentials. They explained the purpose of their visit as a Worker Protection Standard inspection (Exh 1). Thereafter, they proceeded to Mr. Petrocco's office where Ms. Copt filled out a Notice of Inspection form and asked Mr. Petrocco to sign it (Tr. 120). Mr. Petrocco consented to the inspection by signing the Notice of Inspection on the line "Entry by Consent" (Tr. 121; Notice of Inspection).

8. Mr. Petrocco described Petrocco Farm's operations as growing spinach, green beans, cabbage, lettuce, sweet corn, peppers and other crops (Tr. 122; Exh 1).. He stated that Petrocco employs approximately 250 people, the majority of whom are seasonal, doing regular field work, and that about 20 are permanent. Asked what pesticides were used by Petrocco Farms, he replied mostly Lannate, Dimethoate, Dipel and Nu-Cop, but that many other pesticides were also used. He explained that, while Petrocco hired some of the applications to be performed aerially, most were ground applications performed by employees of Petrocco.. He said that Petrocco has about ten employees he referred to as "pesticide handlers". The term "handler" is defined in 40 C.F.R. § 170.3. Asked for pesticide application records for the last 30 days, Mr.

Petrocco supplied records for the period August 18 through September 19, 2001 (Tr. 123; Exh 1c).

9. Asked about worker safety training programs, Mr. Petrocco replied that Petrocco trains their workers and handlers once a year (Tr. 125; Exh 1). He explained that workers are trained using a flip chart and afterwards they were given a brochure "Protect Yourself From Pesticides." He further explained that "handlers" are trained by use of a video followed by a question and answer session. Mr. Petrocco is a certified applicator and conducts the training. He provided Ms. Copt a copy of a roster of employees who were trained (Tr. 126; Exh 1d). The most recent date on this roster appears to be February 25, 1997, while other lists of employees trained are dated in 1995 and 1996. Mr. Petrocco acknowledged that not all employees were trained by the fifth day after their hiring, which is a requirement of the Worker Protection Standard (WPS) (Tr. 128).

10. Ms. Copt discussed with Mr. Petrocco re-entry intervals, decontamination supplies, personal protective equipment, pesticide application procedures and central location information (Tr.128). Mr. Petrocco informed Ms. Copt that Petrocco provides personal protective equipment (PPE) to employees as [pesticide] labels require, that decontamination supplies, i.e., soap, water and paper towels are provided in portable toilets that accompany workers in the field and that for handlers these items were in the cab of the sprayer (Exh 1). Ms. Copt was shown the PPE equipment and pesticide storage areas (Tr. 131) Mr. Petrocco answered in the negative when asked whether they provided handlers with a change of clothing and emergency eye-flush water. He was informed by Ms. Copt that these items would have to be provided. (Exh 1). Petrocco's emergency plan consisted of providing transportation [of ill workers] to the nearest medical center and that they would make certain that the doctors were provided with a copy of the label for the pesticide used.

11. Asked how Petrocco ensures that workers are not exposed to pesticides during pesticide applications, Mr. Petrocco replied that workers are moved to a different field when pesticides are going to be applied (Exh 1). He stated that Petrocco never has "early entry" workers and that workers are informed orally the day before any spraying is to occur. Pesticide handlers are told not to spray when crews are in the field and to stop spraying when it gets windy. Radio contact is maintained with handlers in case of an emergency (id.). If he has a handler who does not read or speak English, Mr. Petrocco goes over the label with him to make sure that all label directions are understood.

12. Mr. Petrocco stated that Petrocco did not have a pesticide safety poster with emergency information and did not post applications made in the last 30 days (Exh 1). Ms. Copt provided Mr. Petrocco a pesticide safety poster and told him that it would have to be posted before she completed her inspection. Ms. Copt asked Mr. Petrocco to write a statement summarizing what he had told her, which he proceeded to do (Tr. 131; Affidavit, Exh 1e).. The statement provides:

"We do worker and handler training to all our workers. Booklets for workers, Video for handlers. We did not know that workers needed training within 5 days of hiring, but are

now doing so. We did not have a pesticide poster posted in the break room, but we do now, it was in my drawer, just needed to be found and posted. We also need to post all applications done within the past 30 days.”

13. Mr. Petrocco stated that he had to leave and Ms. Copt asked him to sign the Notice of Inspection, which he did. The office portion of the inspection concluded at 3:30 pm. Ms. Copt and Mr. Sierra then proceeded to a field to interview some workers and observe the decontamination supplies provided by Petrocco. A photo taken by Ms. Copt (Tr. 134), shows what the inscription describes as water, soap and towels located next to a portable toilet in the field (Exh 1f). Ms. Copt and Mr. Sierra next interviewed two field workers who told them that they did not handle any pesticides and they (the workers) had been trained in pesticide safety, being shown a video and holding a meeting afterward (Exh 1). The workers stated that water, soap and towels were located in the portable toilet. Both were aware of what an REI was and stated that no activities [in the field] were allowed during that period. They stated that if an emergency occurred, transportation to a hospital would be provided.

14. Ms Copt’s Report of Inspection is dated October 26, 2001 (Exh 1). Findings in the report state that David Petrocco Farms does not have a central location where a pesticide safety poster, emergency information, and an application list are posted. Additionally, it states that all workers are not trained within five days of being hired. After completing her report, Ms. Copt testified that she discussed it with EPA management and it was decided to send Petrocco Farms a Notice of Warning (NOW). Ms. Copt drafted a Notice of Warning (Tr.136).

15. A letter, dated October 31, 2001, labeled a Notice of Warning, addressed to Mr. Joe Petrocco, David Petrocco Farms, 14110 Brighton Road, Brighton Road, Brighton, Colorado, is in the record (C’s Exh 2). The letter was signed by Mr. Connally Mears, Director Technical Enforcement Program, EPA, Region 8, and Mr. Michael Risner, Director Legal Enforcement Program (Tr. 41, 42; Exh 2). The letter states that it constitutes a notice of warning pursuant to Section 9(c)(3) of FIFRA³ and that there is reason to believe that you have used a registered pesticide in violation of Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G). The letter would have been more understandable to a person not familiar with the Act or not having access to the United States Code had it explained that the cited section made it unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling. Moreover, the reference to Section 9(c)(3) could lead the recipient to believe that the violations were not serious inasmuch as the provision is phrased in the negative, i.e., the Administrator is not required to institute proceedings for the prosecution of minor violations, if he or she believes the public

³. Section 9 (c) is entitled “Enforcement” and provides in pertinent part:...” (3) Warning Notice Nothing in this subchapter shall be construed as requiring the Administrator to institute proceedings for prosecution of minor violations of this subchapter whenever the Administrator believes that the public interest will be adequately served by a suitable written notice of warning.”

interest would be served by a written notice of warning. Be that as it may, the letter stated that EPA interprets the term “use” to include pre-application activities including training, and post-application activities necessary to reduce the risks of illness and injury. The letter recites that during a Worker Protection Standard inspection on September 20, 2001, you told the inspector that Petrocco Farms does not train all of its field workers before the sixth day of work. Petrocco was informed that this is a violation of 40 C.F.R. Part [§] 170.130(a)(3)(ii). Additionally, the letter states that the inspector did not observe a pesticide safety poster, emergency information, and a pesticide application list posted in a central location, on the date of the inspection. The letter asserted that you also informed the inspector, on that date, that you do not display the pesticide safety poster to meet the minimum basic requirements as required by 40 C.F.R. Part 170.122 and 170.35.

16. Mr. Connally Mears, formerly Director of the Technical Enforcement Program, testified that as the Director he had authority to sign letters of warning, complaints and consent agreements (Tr. 39, 40). He testified that it was standard procedure to issue Notices of Warning, that the letter to Petrocco Farms (Exh 2) was prepared by an investigator under his (Mears’) supervision and signed by himself and Michael Risner, Director Legal Enforcement Program (Tr. 41, 42). The letter bears a date stamp of October 31, 2001, and Mr. Mears testified that the original was delivered to the recipient, Petrocco Farms. He stated that it was EPA’s practice to retain copies of all correspondence mailed out and that the copy in the record, EPA Exh 2, came from files maintained by his office (Tr. 43). Mr. Mears explained the purpose of Notices of Warning was to make sure that the facility was aware violations of the law were found and to encourage the facility to correct the violations (Tr. 45). He pointed out that a consequence of [delivery of] a Notice of Warning was that penalties could be imposed if the violations continued. He answered in the negative the question of whether a NOW was required to include notice of the specific violations of the Worker Protection Standard [found or suspected] (Tr. 46). Mr. Mears explained that EPA nevertheless included specific warnings in order to ensure that the facility fully understood the requirements of the law and to enable it to return to compliance in the shortest and least expensive way (Tr. 47). Asked what provisions of the WPS Petrocco was alleged to have violated, Mr. Mears replied that there was a failure to adequately train workers and a failure to display pesticide application information.

17. Mr. Mears testified that as a general practice EPA and his office sent Notices of Warning by Certified Mail [Return Receipt Requested] (Tr. 48, 49). He explained that it was important to have a return receipt in the record in case the violations continued and further proceedings were necessary (Tr. 49). He testified that the NOW in this instance was sent [to Petrocco Farms] by Certified Mail, Return Receipt Requested, because it was “our” standard practice and because the top of the letter (Exh 2) so indicated. He instructed his clerical assistant to send the NOW by Certified Mail and pointed out that it was addressed to Mr. Joe Petrocco, David Petrocco Farms, 14110 Brighton Road, Brighton, Colorado 80601. The Certified Mail Receipt or stub (C’s Exh 3) is for an item, bearing Tracking No. 7000 1670 0011 7028 7689, addressed simply to Joe Petrocco, 14110 Brighton Blvd, Brighton, Colorado 80601..Mr. Mears testified that this was the same street address as on the NOW (Tr. 51). This is inaccurate

because the street address on the NOW is 14110 Brighton Road, while that on the receipt or stub is 14110 Brighton Blvd.

18. A Return Receipt for Certified Mail, bearing the above tracking number, and for an item addressed (Box 1) to Joe Petrocco, David Petrocco Farms, 14110 Brighton Blvd, Brighton, CO, 80601, is in the record (Tr. 52, 60, 61; C's Exh 4). The receipt bears a stamped date "Nov-6 2001", the signature of Rose Wolf, having a box entitled "Agent" checked, and a stamped "SCANNED" in Box D which is for a delivery at an address different from that shown in Box 1. Beneath the outline of the form on the copy is a stamped date "Nov-2 2001". Instructions beneath a heading on the Return Receipt entitled "Sender Complete This Section" include the following: Print your name and address on the reverse so that we can return the card to you." The address on the reverse (page 2 of Exh 4) is as follows: "US Environmental Protection Agency ATTN: Jolene Montoya, Technical Enforcement, 999 18th Street Suite 300 Denver, CO 80202-2466." This page bears a stamped "RECEIVED Nov-9, 2001 Office of Enforcement", indicating receipt by EPA on that date. Mr. Mears testified that receipts [for Certified Mail when received] are retained in the same file as "our" copy of the letter sent out on a particular enforcement case (Tr. 53, 54) He did not know who Rose Wolf was nor did he know the meaning of the term "Scanned" on the receipt . He stated that his office had no occasion to check to see if a NOW was actually received by the addressee, because "we" assume that the U.S. Postal Service had procedures in place to assure receipt of the document by the addressee (Tr. 56). He had no personal knowledge that the NOW had been delivered (Tr. 61).

19. Ms. Rose Wolf testified that she had been employed by the U.S. Postal Service at the Brighton Post Office for 15 years (Tr. 66, 67). Her present job title and her title in 2001 and 2002 was "Rural Carrier". She stated that Petrocco Farms was on her postal route and indicated that whether a letter was addressed to Brighton Road or Brighton Boulevard [on her route] would not make any difference as to its delivery (Tr. 67, 68). She identified Exhibit 3 as a Certified Mail Receipt ["stub"] for an [article] addressed to Joe Petrocco at 14110 Brighton Boulevard, Brighton, Colorado 80601 and Exhibit 4 as a Return Receipt for an article addressed to [David] Petrocco Farms, [at the same address] signed by her and dated November 6, 2001 (Tr. 68, 69). She pointed out that the Certified Mail number on the stub and on the return receipt were the same. Asked whether she had attempted the initial delivery of the mentioned Certified Mail article on November 2, 2001, she answered in the negative, stating that it was her day off (Tr. 69). She explained that [in her absence] a substitute carrier would have the same duties as a regular carrier and would deliver or attempt to deliver Certified Mail (Tr. 71). Describing what happened in case of an attempt to deliver Certified Mail and no one was there to accept it, she stated that [the carrier] would leave a [Form] 3849, which is a "notification" and which we call a "peach slip" (Tr. 72). She testified that the notification would include information as to whom the article was addressed, who it was from, the Certified Mail number of the article attempted to be delivered, the date and the date the article can be picked up from the Post Office. A blank Form 3849 is in the record (C's Exh 44b). Asked how she knew or recalled that she was not the carrier who attempted delivery of the referenced Certified Mail article to Petrocco Farms on November 2, 2001, Ms. Wolf replied that she recognized her substitute's writing on the

notification (Tr. 73). As indicated infra, this portion of completed Form 3849 is not available, having been destroyed in accordance with normal Postal Service procedures. Ms. Wolf explained that she saw the signature of Stephanie Case on the notification at Petrocco Farms at an unspecified date (Tr. 73, 74). Although the signature on the form is "S. Case", Ms. Wolf testified that she knew Stephanie Case, that she worked for Petrocco Farms and that Stephanie was in the front where she (Ms. Wolf) delivered the mail. A roster of key personnel of Petrocco Farms and their e-mail addresses from the Petrocco Farms' Web site, identifies Stephanie Case as "Financial Office Director, Bookkeeper, Accounts Pa[yable]" ("Contact Information", C's Exh 5).

20. Ms. Wolf testified that, after seeing Stephanie Case's signature on Form 3849, she took the slip back to the Post Office and gave it to the check-in-clerk, who would retrieve the article and put it in her (Ms. Wolf's) bin for delivery the next day (Tr. 76). She testified that she would have taken the article "back out" to deliver [to Petrocco], but they must not have been there. Seeing that Stephanie had filled out both sides of the back of [Form] 3849, Ms. Wolf explained that she signed the "38" [PS Form 3811 Domestic Return Receipt] letter. The facing page of United States Postal Service Form 3849 states "Sorry We Missed you! We Deliver For You." To the right and in bold print "We will redeliver or you or your agent can pick up. See reverse." (Exh 44b). The heading on the reverse of Form 3849 states: "We will redeliver OR you or your agent can pick up your mail at the post office. Bring this form and proper ID. If your agent will pick up, sign below in Item 2, and enter agent's name [here]. "The "Delivery Section" on the reverse of the form is beneath the address of the Brighton Post Office and contains spaces for "Signature", "Printed Name" and "Delivery Address". To the left on the form are instructions: "1.a. Check all that apply in section 3, b. Sign in section 2 below, and c. Leave this notice where your carrier can see it. 2. Sign Here to Authorize Redelivery or to Authorize an Agent to Sign for You and 3. Redeliver (Enter day of week)."

21. Asked to explain what she meant by "both sides of the [reverse] of the form having been filled out by Ms. Case", Ms Wolf replied that the only part of the [Form 3849] that the Post Office retains is the part that says "Signature", "Printed Name" and "Delivery Address" . She added that there was a section to the left, numbered 1, 2, 3 [described in the previous finding] which also has a place to sign, to [authorize] redeliver[y] and provide them [the carrier] an address (Tr. 76). Referring specifically to the executed Return Receipt (C's Exh 44a), Ms. Rose acknowledged that was her signature (Tr. 77, 78). Asked why she signed the form, she replied that she did not remember specifically, but that the only way she would have signed it was because no one was there and both sides of the [reverse] of the peach slip were signed (Tr. 78, 80). She maintained that she would not have signed it, if only one side of the form were signed. She alluded to language on the form providing that [by signing here], I authorize redelivery or an agent to sign for me. She acknowledged that she was not named as agent on the form.

22. A fax transmission from the United States Postal Service, dated 08/21/2003, addressed to Complainant's counsel states, with reference to Certified item number

700016700011770270287689, that the delivery record shows that this item was delivered on 11/06/2001 at 2:07 PM in Brighton, CO 80601 (Exh 44c). The mentioned transmission further states that the scanned image of the recipient information is provided below: Delivery Section [,] Signature of Recipient "S Case" and beneath that line [representing space for the printed name] "S Case" and Address of Recipient "14110 Brighton Rd, Brighton, CO 80601" (Tr. 82). The mentioned delivery record is in evidence because Ms. Wolf identified it and because of a Certificate of Authenticity of Domestic Business Records Pursuant to Federal Evidence Rule of Evidence 902(11).⁴ Ms. Wolf testified that she would have had to have picked this up in order to deliver an article (Tr. 81). Asked how such precision in the delivery time was possible, Ms. Wolf replied that we have scanners and that there is a UPC code on each letter and also on the peach slip and that they scan the article to be delivered. If delivery is not effected, we put "attempted" on the scanner and if delivery is [subsequently] effected, we scan the 3849 which has the time and the date. Although she testified that she had no specific memory of delivery of the Certified Mail article at issue here, she indicated that she performed the scanning on the Return Receipt (Exh 44a) and that the result of this scanning (Exh 44c) would have been from the "Delivery Section" of Form 3849 (Exh 44b). On cross-examination, she stated that she scanned the number or UPS symbol which connects [with the article] and states the time and date (Tr.101-02), She explained, however, that Exhibit 44c was not [from] the scanner she used, but was a photocopy from Denver where all of these forms get sent to be copied..

23. Ms. Copt conducted a follow-up inspection of Petrocco Farms on August 8, 2002 (Tr. 137, 138; Report on Inspection, C's Exh 6). The Report on Inspection is dated October 3, 2002. Ms Copt was accompanied by Elias Balbinder, who was to act as an interpreter for interviews with Spanish-speaking employees and, although the Report on Inspection doesn't mention her presence, by Peg Perrault, an EPA environmental scientist who was receiving on-the-job training as an inspector (Tr. 140). As on the prior inspection, they were met by, and presented their credentials to, Mr. Joe Petrocco, who identified himself as Assistant Director. Mr. Petrocco consented to the inspection by signing the Notice of Inspection (Tr. 141-42, 144;

⁴. C's Exhibit 45. The Certificate is an affidavit, dated December 9, 2003, by Juan Muñoz, Postmaster of the Brighton Post Office, who states that he is the custodian of the records for such business entity. He further states that the attached record [delivery and recipient information for delivery of Certified item number 70001670001170287689] is a true duplicate of the original record which was in the custody of the Brighton Post Office but the original record was sent to the Denver Post Office for scanning and disposal of such records as is the regular practice of the USPS, and that I am custodian of the attached record consisting of one page. Mr. Muñoz further states that the attached "scanned image of the recipient information" record to this certificate was made at or near the time of the occurrence of the matters set forth, by, or from information transmitted by, a person with knowledge of those matters; such record was kept in the course of regularly conducted business activity of making certified mail delivery record available to postal customers by internet computer access; and such record was made by the USPS as a regular practice.

C's Exh 6a). Mr. Petrocco described crops grown by Petrocco as lettuce, spinach, cabbage, sweet corn, [green beans], peppers and other crops (Tr. 144). Although the Report on Inspection quotes Mr. Petrocco as stating that Petrocco Farms had about 250 field workers, it appears that 250 is the total number of employees and that about 20 of these are permanent (Tr. 144).

24. Asked whether Petrocco had applied pesticides in the last 30 days, Mr. Petrocco answered "yes" and asked for records of such applications, he produced a notebook of computer generated [application] records (Tr. 145). The Report on Inspection, dated October 3, 2002 (Exh 6), written by Ms. Copt, contains no indication that she was shown a notebook of application records. Her testimony, however, was that upon looking through the notebook, she did not observe any applications within the last 30 days (Tr. 145-46) She pointed this out to Mr. Petrocco, who responded that the secretaries had not yet entered the last 30 days of applications into the computer system (Tr. 146). Mr. Petrocco then produced a handwritten applicator's log covering the period July 12, 2002, through August 4, 2002, which had not yet been translated from Spanish into English (Tr. 146-47; C's Exh 6-b). Ms. Copt identified some of the pesticides in the handwritten log as Nu-Cop, DiPel, Dimethoate, Warrior, Asana, as well as others and testified that the log covered [only] ground applications (Tr. 148). There is, however, no persuasive evidence that there were any aerial applications during this period. Asked what requirements of the [WPS] were not included in the log, Ms. Copt replied that it did not include the active ingredient for the pesticide, the EPA registration number, the time of application, or the restricted entry interval (Tr. 150). She testified that, if this document were displayed in a central location, it would not meet the requirements [of the regulation] for displaying specific information concerning pesticide applications (Tr. 151).

25. Ms. Copt testified that when she asked Mr. Petrocco about training, he replied that they usually train all of their workers and handlers once a year (Tr. 151; Exh 6) They use a "flip chart" presentation for workers followed by a brochure "Protect Yourself From Pesticides." Handlers are trained by use of a video, followed by a question and answer session.. Mr. Petrocco is a certified applicator and conducts the training. A roster of employees trained on April 1, 2002, is in evidence (C's Exh 6-c). Asked how they ensured that no workers were exposed to pesticides during application activities, Mr. Petrocco replied that notification of applications is done orally over the radio. He denied ever having early [re]-entry workers.

26. Ms. Copt testified that she discussed with Mr. Petrocco re-entry intervals, pesticide application procedures, personal protective equipment, de-contamination supplies and central location information.(Tr. 153; Exh 6). She told Mr. Petrocco that she was looking for a pesticide safety poster and information concerning pesticide applications made within the last 30 days (Tr. 154). He then took her to the employee lunchroom where there was a pesticide safety poster having emergency information hanging on the wall outside the lunch room. Ms. Copt took photographs of the poster which appear to show emergency and safety information in English and in Spanish. Xerox copies of these photos are in evidence (Exh 6-e). Although an inscription attached to the photos and the Report of Inspection state that the poster was posted outside the lunch room, Ms. Copt testified that this poster, a first-aid kit and labor-related notices were

posted on the wall in the “break room” at Petrocco Farms (Tr. 155). She did not observe any evidence of pesticide applications displayed at or near the safety poster and she informed Mr. Petrocco that they would need to post specific information about pesticide applications made in the last 30 days near the safety poster in order to be in compliance with WPS for central location information (Tr. 154-55). She read from an EPA Question and Answer document (Exh 33) that EPA used the word “display” to indicate that access to the information must be unrestricted and that [pesticide application information] need not be requested (Tr. 157) Asked whether the employee break room at Petrocco Farms was consistent with the mentioned requirements for display [at a central location], she answered in the affirmative (Tr. 157-58).

27. Ms. Copt informed Mr. Petrocco that they wished to see decontamination supplies and to interview one or two field workers. Prior to following Mr. Petrocco out to the field, they returned to his office to complete the paperwork (Report of Inspection, Exh 6). Mr. Petrocco wrote out a statement (affidavit) summarizing what he had told the EPA inspectors (Exh. 6-d). That statement is as follows:

“TO Whom It May Concern:

We, here at Petrocco Farms, train our employees, both workers and handlers, according to EPA Worker Protection Standards. After training each employee receives an appropriate card certifying that they were trained.

We have the EPA poster in our break room with emergency info on it.

We keep our pesticide records on computers, inputted by our secretaries after they have been applied and documented by our applicators. Our sanitation facilities are in the field at fill stations.”

Mr. Petrocco then signed the Notice of Inspection, signifying that he had received a copy (Exh 6-a).

28. Ms. Copt and the assisting inspectors then followed Mr. Petrocco out to a field where a crew was harvesting lettuce (Report of Inspection). Joe Petrocco did not accompany them on this portion of the inspection. They did, however, meet David Petrocco (Sr.?), who gave them permission to speak to some workers, but said that the crew would be moving on in a couple of minutes. Interviews were conducted in Spanish with Mr. Balbinder as interpreter. The first worker interviewed had only been working for Petrocco about three months. He stated that he had never been trained in pesticide safety, that he was not aware of what pesticides were being applied and that he was not told when [pesticide] applications will be made (Tr. 174) This worker ran away to rejoin his crew, who were leaving the area. The second worker interviewed had been working for Petrocco for years, said he had been trained in pesticide safety, that he is told when spraying activities will occur, that he knows what an REI is and that no activities [in the field] are allowed during that period. This worker also stated that they were provided with water, soap and paper towels which were located in the portable toilet. Ms. Copt verified that water, soap and paper towels were provided. Findings in the Inspection Report prepared by Ms. Copt state that David Petrocco Farms does not post an application list of all pesticides applied within the last 30 days in a central location accessible to all their workers.

Additionally, the Report states that, based on worker interviews, it was unclear whether all workers were trained in pesticide safety prior to work in the fields.

29. Ms. Copt testified that she called Joe Petrocco on or about May 13, 2003, and asked him for a copy of pesticide application records showing EPA registration numbers for pesticides applied during the period July 12, 2002, through August 4, 2002 (Tr. 176). She explained that EPA registration numbers were not provided in the handwritten applicator's log she obtained during the inspection on August 8, 2002. In response, she received a three-part fax from Mr. Petrocco, which along with a covering memo totaled 25 pages (C's Exh 7).. The memo stated, inter alia, the following is the chemical reporting we have from July 12-2002 through August 4-2002. Ms. Copt stated and examination of the application record, confirms, that the exhibit (computer printout) includes applications made during the period July 10, 2002, through August 12, 2002 (id.; Tr. 177, 181). At Ms. Copt's request, Petrocco Farms, by letter, dated May 16, 2003, provided a hard copy of the application records which had previously been faxed to Ms. Copt (C's Exh 8). As does the fax copy, this copy includes applications made during the period July 10, 2002, through August 12, 2002. The letter, signed by Julie Petrocco, Office Manager, states that in order to properly interpret the records, [you] should pay attention only to the date of each application. The actual application number indicates the order in which each of the sprayings were performed. In other words, we have a few different employees that are sprayers. They hand in their spray reports at different times during the week, and we try to get them in the system as soon as possible The letter further states that the application number indicates the order in which the sprayings were performed, that is, the system assigns numbers by chronological order, not by date.

30. Ms. Copt testified that the computer printouts of the application records included applications made between August 5, 2002, and August 8, 2002, which were not included in the handwritten applicator's log (Exh 6-b) she obtained during the August 8, 2002, inspection (Tr. 182). She stated that nine separate pesticide application entries were made during this period, each of which represented the application of 27 pesticides. This testimony is erroneous as it appears that eight pesticide application entries were made during this period, representing 27 pesticide applications.⁵ Testifying with reference to Julie Petrocco's letter which forwarded a hard copy of the computer application records (finding 29), Ms. Copt pointed out that the letter indicated that records of pesticide applications were entered into the computer system after the applications were made and that this would not comply with WPS which required that specific information about pesticide applications be displayed prior to the applications being made, if workers were on the establishment or, if workers were not on the establishment when the

⁵ Tr. 182 Counting two entries representing pesticide applications on August 8, 2002, there are eight entries after August 4, 2002, and through August 8, 2002, even allowing for the fact there are two applications numbered 315 on August 7, one to a lettuce field and one to an onion field (Exh 8 at 22 and 24). These entries represent a total of 27 pesticide applications rather than each entry representing the application of 27 pesticides (Tr. 183).

applications were being made, prior to the first work period (Tr. 184-85). She emphasized that Ms. Petrocco's letter was in accord with the statement in Mr. Petrocco's affidavit (Exh 4), i.e., that records of pesticide applications are inputted to the computer system after the applications are made. Because she had asked Mr. Petrocco for application records for the last 30 days and he had informed her that these applications had not [yet] been entered into the computer, she estimated that at the time of the inspection on August 8, 2002, there was a delay of at least 30 days between the time of the application, the application record was written, turned into the office, translated from Spanish into English, entered into the computer and printed out to be displayed (Tr. 186-87).

31. Ms. Copt explained the application number that appears in the upper left corner of every entry in the computer application records (Tr. 187). She stated that these numbers were automatically assigned by the computer software in sequential order, analogous to the numbers in a checkbook. She pointed out that the lowest application number would correspond to the earliest date an application entry was entered into the computer (Tr. 188). She testified that the lowest application number was 202, Exhibit 7 at 10, representing applications made on August 1, 2002 (Tr. 189, 190-91). The next highest application number was 235, also on page 10 of Exhibit 7, representing applications made on August 12, 2002. These application numbers reflect the sequence in which application numbers are entered into the computer rather than the date of the applications. This indicates that Application Nos. 313, 314, 315, 317 and 319 made on August 5, 7 and 8, 2002 (Exh 8 at 22, 24) were entered into the computer prior to any applications made in July 2002. See, e.g., Application No. 457 made on July 10, 2002, and Application No. 513 made on July 31, 2002 (id. at 3, 17). This anomaly is not explained by Ms. Julie Petrocco's statement that [sprayers] hand in their reports at different time during the week (finding 29), but seemingly is indicative of much greater delays in entering application data into the computer (finding 30). Ms. Copt testified that she had spoken with a representative of the software vendor who told her that the application number was a unique number assigned by the computer software, which could not be manipulated by the user. This information was confirmed in a letter from Famous Software, dated March 8, 2004.⁶ In further testimony, Ms. Copt opined that the only application number which could have been in the computer on the date of her inspection on August 8, 2002, was No. 202, representing pesticide applications made on August 1, 2002, and that all other [higher] application numbers had to have been entered into the computer subsequent to August 1 [8], 2002 (Tr. 205-06).

⁶. Exhibit 55. The letter states in part: The chemical application entry screen is used, as the name implies, to enter and track applications of chemicals. The entry screen allows a user to enter specifics regarding a specific operator, site and crop. A key to this entry screen is the application number field identified as Appl. #. This field is a sequential number that is automatically assigned by the software and cannot be changed by the user. The application number is a means of grouping chemical applications that occurred on a site on a given day and time and serves as the basis for reporting information.

32. Mr. Jerry “Sonny” Anderson is the chemical manager for Petrocco Farms and has occupied that position since 1995 (Tr.623-24). His duties include “keeping track” of records of pesticide applications. He identified the photograph (R’s Exh A), building to the right, as Petrocco Farms’ office building warehouse.⁷ The smaller building in front of the warehouse, which appears to be attached to the warehouse, has two doors, the one on the left marked “Shipping and Receiving”, marked No. 1 on the photo, and the one on the right marked “Employees [Only]”. Mr. Anderson testified that [upon entering the door marked Shipping and Receiving and turning right] there was hallway, which he described as basically open, leading to the Employees Only entrance, marked No. 2 on the photo (Tr. 626). Beyond a half-door was an area referred to as the “worker reception area.” Mr. Anderson testified that his office was not shown in the photo, but was approximately 300 feet to the south of the building to the left in the photo [and across the driveway from the office warehouse] , marked No. 3 on the photo(Tr. 627, 632). Describing the location of the employee lunchroom, he referred to a black square to the right [and adjacent to stacked forklift pallets] in the photo, marked No. 4, of the building to the left as the entrance to the employee lunchroom. Close examination of the photo reveals another door inside this entrance. Mr. Anderson stated that inside the walkway and to the right was the entrance to the employees’ lunch room and to the left is a roll-up door to a warehouse (Tr. 628)

33. Describing pesticide application records maintained in 2001, Mr. Anderson stated that “we” used a form purchased from Gempler’s which asked for the date of the application, and the time, the name and brand name of the chemical, the EPA registration number, the amount applied per acre, the re-entry time and the applicator’s name (Tr. 629). He testified that the Pesticide Application Record (C’s Exh 1-c) was the type of record maintained by Petrocco and that, at the time of the September 20 inspection, these records were maintained in his office.(Tr. 631-32). He estimated the distance between the lunch room and the employee entrance in the office warehouse as 75 feet.⁸ In addition to confirming that employees were given EPA Worker Standard Training, he testified that a sign “Do Not Enter ” was posted in a field as it was sprayed (Tr. 630). Mr. Joe Petrocco indicated that this practice was discontinued

⁷ Tr. 624-25. Complainant objected to the introduction of the photograph of Respondent’s office building and warehouse area (Exh A) upon the ground it was not identified as a prehearing exhibit and alleges on brief that Respondent’s use of this photo was highly prejudicial to Complainant (Brief in Support of Proposed Findings and Conclusions at 31, note 22). However, a photo of an immovable object such as a building is not readily subject to manipulation and the photo served to facilitate as well as make comprehensible testimony which otherwise would have been difficult to follow. Under these circumstances, the contention that the photo was highly prejudicial is not persuasive. Complainant’s argument that the photo should not be considered is rejected.

⁸. The employee lunch room had not been installed at the time of the EPA inspection on September 20, 2001 (Joe Petrocco, Tr. 654). Mr. David Petrocco, Sr. testified that the lunchroom was built in the spring of 2002 (Tr. 714).

because they kept forgetting to remove the signs.⁹ Referring to other measures to ensure that workers did not enter fields being sprayed [or before it was safe to do so], he stated that first of all, they would not be there unless they were told [by crew chiefs] to be there (Tr. 644-45).

34. Mr. Anderson recalled meeting three people from EPA at the time of the inspection in September, 2001 (Tr. 632). The only one whose name he remembered was Britta [Copt]. He testified that he met her inside the shipping and receiving door of the office building and that he showed her the [spraying] records which were in a three-ring binder (Tr. 633-34). He asked her if the records were okay and was told that they were.¹⁰ Upon being told that the records were maintained in his (Anderson's) office, Ms. Copt stated that the records needed to be kept in a "central location", which Mr. Anderson understood to mean the [office] building they were in (Tr. 634-35). Respondent acknowledges, however, that Ms. Copt left determination of the "central location" to Petrocco (Proposed Findings of Fact No. 3). Ms. Copt did not mention meeting Mr. Anderson in her testimony nor does the Report on Inspection written by her refer to any such meeting. Nevertheless, Complainant maintains that Mr. Anderson's recollection of his conversation with Ms. Copt during the September 20 inspection concerning a "central location" is inconsistent with Mr. Petrocco's testimony concerning safety posters (infra finding 38) and in effect acknowledges that the mentioned conversation between Ms. Copt and Mr. Anderson did in fact occur (Brief In Support of Proposed Findings and Conclusions at 32). Mr. Anderson testified that during the 2002 season pesticide application information was kept in a three-ring binder on a shelf near the door marked No. 2 on the photo, sometimes referred to as the "worker reception area", in the office building (Tr. 636-37). He stated that this area was accessible to everybody and that you did not have to ask to see the notebook. Mr. Anderson further testified that there was poster with emergency information on the wall near the binder (Tr. 639-40). In April of 2002, Petrocco switched to maintaining pesticide application records on a computer (Tr. 638). This method had not been used before, but the thought was that it

⁹. Report on Inspection, Exh 6 at 2. The regulation, 40 C.F.R. § 170.120(b), provides in pertinent part " (1) If the pesticide product labeling has a statement requiring both the posting of treated areas and oral notification to workers, the agricultural employer shall post signs in accordance with paragraph (c) of this section and shall provide oral notification of the application to the worker(s) in accordance with paragraph (d) of this section." Only the labels for Di-Syston and Lannate require both posting and oral notification (Exhs 17 and 19). The record establishes that Petrocco Farms provides oral notification to workers of all scheduled and actual pesticide applications and there is no evidence or allegation that it failed to comply with posting requirements for Di-Syston and Lannate.

¹⁰. Complainant acknowledges that the "Gempler" forms kept but not displayed by Respondent in 2001 would have met the requirements of the regulation, if displayed at a central location and, if the records included all applications made within 30 days and displayed within the timing requirements of the regulation (Brief in Support of Proposed Findings of Fact and Conclusions of law at 17, note 12).

would be a better system by eliminating handwriting and making it easier to track applications. Mr. Anderson was not present during the EPA inspection on August 8, 2002.

35. Mr. Joe Petrocco is the son of David Petrocco, Sr. He testified that he has been involved with the family-owned business, David Petrocco Farms, Inc., “pretty much all my life” (Tr. 646-47). He has a B.A. in biology, emphasis botany with a minor in Spanish, obtained in 1995. By his own assessment, he speaks Spanish fluently. Although he called himself “co-director”, he stated that [essentially] he was a grower. He testified that he did a lot of the interviewing and hiring [for Petrocco Farms] and that, inter alia, he installed and ran computer systems in use throughout the farm. Mr. Petrocco is a certified applicator and conducts pesticide safety training for workers and handlers (Tr. 649, 651). For this purpose, he uses a “flip chart” , which is written in both English and Spanish and which covers every thing in the Worker Protection Standard, on how to protect yourself from pesticides for workers and a video, followed by a question and answer session, for handlers (Tr. 648). He stated that he spoke to employees in Spanish and that 99.9% of workers (including warehouse workers) and handlers spoke only Spanish (Tr.649-50). He did not know any of these employees who read English (Tr. 651). Describing protective equipment provided by Petrocco to handlers, he mentioned coveralls, boots and gloves (Tr. 652). He added that field- workers were required to wear long-sleeved shirts and that wash water was provided.

36. Mr. Petrocco testified as to the EPA inspection on September 20, 2001 (Tr. 653-54). After [Ms.Copt] showed him her badge, he signed the consent [to the inspection]. He cooperated with her [by answering her questions] and providing everything she asked for. When she asked for application records, which were kept in Sonny’s office, he (Petrocco) called Sonny to bring the records which Sonny did. Mr. Petrocco did not recall Ms. Copt commenting on whether the records were appropriate, but testified that she wanted the records maintained in a central location so that they would be available to all employees to inspect (Tr.655). He acknowledged that Ms. Copt did not specify exactly where the records were to be kept, but explained that she indicated generally that it should be where most employees congregate (Tr. 656). After discussions with Sonny and David Petrocco, Sr., it was decided that the records for 2002 should be maintained where employees come to pick up their mail and pay checks, i.e., the office (“ worker reception area”), marked No. 2 on the photo, Exh A (Tr. 656-57). Describing the location of the notebook containing pesticide application records beginning in April, 2002, Mr. Petrocco testified that the notebook was on a shelf above and to the side of a desk and that this shelf was accessible to all workers.¹¹ He stated that the notebook could be reached without having to ask for it and that a [safety] poster was posted in that area.

¹¹. Tr. 659-60. The transcript reflects that Respondent’s counsel phrased a question as to the label on the binder as “Pesticide Application Log 2001” (Tr. 660). It is clear, however, that at the time of the September 20 inspection, the binder containing pesticide application records was maintained in Sonny Anderson’s office.

37. Mr. Petrocco described meeting Ms. Copt in the hallway between door No. 1 and door No. 2 as depicted on the photo (Exh A) at the time of the inspection on August 8, 2002 (Tr. 661, 663). As in the prior inspection, he signed consent to the inspection, allowed her access to wherever she wanted to go and provided her the information she requested (Tr. 663-64, 665). He testified that at the time the notebook of pesticide [of computer generated] application information (application log) was maintained [behind] the employees door, No. 2 [on Exh A], otherwise referred to as the “worker reception area” (Tr. 664). Mr. Petrocco further testified that Ms. Copt asked to see the notebook or pesticide application log, that he gave it to her and that she also asked for spray records which he provided (id.). Although the Report on Inspection written by Ms. Copt (C’s Exh 6) contains no indication that she was shown a notebook of application records, her testimony was that the notebook did not contain any record of applications made within the last 30 days (finding 24). Ms. Copt described deficiencies in the handwritten applicator’s log (spray records) for the period July 12, 2002, through August 4, 2002, as failure to include the active ingredient and the EPA registration number of the pesticide, the time of application and the restricted entry interval (id.).

38. Upon being asked to see the safety poster, Mr. Petrocco took Ms. Copt to the lunchroom (No. 4 on Exh A) where there was a safety poster hanging on the wall outside the lunchroom (Tr. 665). Mr. Petrocco testified that at this time, Petrocco had three safety posters posted, one in the worker reception area, one at the lunchroom and a third immediately inside the door marked “Shipping and Receiving” (Tr. 667, 673-74, 675, 677). Asked why he had taken Ms. Copt to see the poster at the lunchroom rather than showing her the poster inside the door (No. 1 on Exh A), Mr. Petrocco replied that at the time of the September 20 inspection, the warehouse worker’s lunchroom was on a platform above the cucumber line through the door marked No. 6 [at the extreme right side of Exh A] (Tr. 678). He testified that in his opinion this was a very poor place for employees to have their break, but that is where it was and that [because that was where employees congregated], Ms. Copt indicated that was where the poster should be. As indicated (finding 26), an inscription on photos of the safety poster taken by Ms. Copt states that the [poster] was posted outside the lunchroom. Her testimony, however, was that a safety poster, a first-aid kit and labor related notices were posted in the “break room” at Petrocco Farms. Although Ms. Copt did not describe her understanding of “break room”, it appears to be clear that it is not the same as the lunch room referred to in her report of the inspection conducted on August 8, 2002 (finding 26). Moreover, the statements (affidavits) written by Mr. Petrocco at the time of the inspections on September 20, 2001, and August 8, 2002 (findings 12 and 27) refer to the break room and it is likely that this term refers to what has otherwise been identified as the “employee reception area” (Exh A, No.2).

39. Describing the pesticide application and record keeping employed by Petrocco Farms, Mr. Petrocco explained that the handlers would take the application [record], referred to as a “recipe”, after they had been directed to make the application by a grower directly to the receptionist whether she was there or not and that the receptionist would input the information into the computer and [after printing] place it in the two- or three-ring binder (Tr. 681). Asked whether this meant that applications were entered into the computer on a daily basis and before

the applications took place, Mr. Petrocco replied that, “it depends” (Tr. 681-82). He stated that, if there were workers in a field by themselves, yes [applications were entered into the computer before the applications were made.]. His explanation, however, does not support this assertion, for he said that at daybreak, they would write the recipe, turn it into the black box, and go apply the pesticide.¹² When the secretary arrived, she would get it, input it and post it. Nevertheless, David Petrocco, Sr. testified that, if workers were on the establishment, record of the application was entered into the computer prior to the application (Tr. 730-31). Joe Petrocco answered in the affirmative whether Exhibit 7 contained the type of information displayed [in a three-ring binder] at the time of the August 8, 2002 inspection, explaining that the display would include applications before that date (Tr. 683). He testified that Exhibit 7 was a copy of the printout displayed in his office on August 8, except for applications after that date.¹³ Asked on cross-examination about the computer run dates (10/03/02 and 11/26/2002) which appear at the top of the pages of application records, Exhibits 7 and 8, Mr. Petrocco responded that it seems like anymore that “...we print it out just about every day “(Tr. 684). He explained that we get questions about EPA inspections and that some customers request the printouts on a regular basis, that labeling situations come up and that he has used [the printouts] for a variety of situations (Tr.685).Mr. Petrocco insisted that, notwithstanding the Notice of Inspection which he signed refers only to spray records and makes no mention of computer application records (Exh 6-a), he had given or shown Ms. Copt a notebook of computer application records at the time of the August 8 inspection (Tr. 695-96, 697-98). While Mr. Petrocco’s testimony in this regard is accurate, he did not recall her leaving with [a copy] of the computer printout application record. Asked whether it was possible that the computer application record he had shown Ms. Copt did not contain records of applications made within the last 30 days, he replied “I suppose anything is possible “ (Tr.699).

40. Asked whether, subsequent to the EPA inspection on September 20, 2001, he had ever received a letter from EPA referred to as a Notice of Warning, Mr. Petrocco replied that he had not (Tr. 667-68). In fact, he denied ever seeing the Notice of Warning, dated October 31, 2001 (Exh 2), until after the complaint herein was filed (Tr. 668).

¹².Mr. Anderson identified the “black box” visible in the photo at the side of the office building (Exh A) as a mail box (Tr.640). He said that mail was left there when the office was closed.

¹³.Application No. 531 was performed on August 10, 2002, and Application Nos.532, 533, 534, 235 and 242 were performed on August 12, 2002 (Exh 7 at 5, 6, and 10). Application Nos. 528 and 529 appear to have been performed on September 10, 2002 (id. at 5), which seems unlikely and may be a typographical error. If, however, the September 10 date is accurate, it throws into doubt Complainant’s contention that application numbers are entered into the computer in chronological order.

41. Mr. David Petrocco, Sr. is the president and an owner of Petrocco Farms, Inc (Tr. 700-01). He identified vegetables grown by Petrocco Farms as including cabbage, lettuce, bulb onions, spinach, various bunch greens, red beets, green beans and peppers, saying that he sometimes forgets one or two. He testified that he has been in the farming business all of his life and in business for himself for nearly 40 years (Tr. 702). He identified members of his family involved in the business as two brothers, Dominic and Albert; his wife, Susan; his daughter, Julie; his son, David, Jr.; apparently forgetting his son, Joe (Tr. 703). He confirmed that during the peak season Petrocco Farms had approximately 250 employees of whom about 20 were permanent (Tr. 704). Twenty is the approximate number of warehouse employees. Describing Petrocco Farms' operation, Mr. Petrocco explained that some vegetables, e.g., red beets and spinach are planted in very small plots of one-to- three acres according to demand or sales in previous years and in sequence so that our production meets sales in a particular segment of the market place. He contrasted these crops with a large volume crop such as cabbage which is grown on 10-to-20 acre plots (Tr. 704-05).

42. Asked how they determined when to apply a pesticide, Mr. Petrocco replied that each one of our "growers" does scouting to observe the crop for disease and insect pressures (Tr.705). In addition, he stated that we employ a professional service to scout and assist us. He knows that all pesticides applied by Petrocco Farms are EPA registered from the labels. Mr. Petrocco testified that "we" at Petrocco Farms are "hands-on growers" (Tr. 705-06). He explained that basically there are four growers including himself and that each grower is assigned a different location or farm and is responsible for crops thereon from seed to harvest. Below the growers are approximately seven crew chiefs that have been trained for the harvest of specific crops. He noted, however, that there were other operations such as weeding and thinning which the workers have been trained to do and that at harvest time specific groups harvest specific crops (Tr. 707). Further explaining the process by which a grower determines to apply a pesticide, Mr. Petrocco stated that in order to produce a crop that is salable as U.S. No. 1, the vegetable must be relatively free of such thing as holes in the leaves, droppings, scar tissue from insects such as aphids sucking on tissue and tarnish from bacteria and fungi (Tr. 707-08). After ordering the application, the grower notifies the crew chief of spraying and, being very conscious of the establishment, and if workers are to be on the establishment while the application is being made, the notification is [the date of the determination]. Asked what responsibilities crew chiefs have with regard to pesticide applications, Mr. Petrocco replied that they are notified of areas that are to be treated and make sure that workers do not enter a field until expiration of the RE[I] (Tr.708-09).

43. Mr. Petrocco testified that Petrocco Farms has a very high return rate among workers some of which have been "with us" as long as 24- to- 28 years (Tr. 709). He referred to seasonal workers which migrate from other growing areas and return in the summer time. He acknowledged that some were from Mexico as well. He estimated that 90% of field workers return more than one or two years and that crew chiefs have been employed by Petrocco Farms an average of 15 years (Tr. 710). He described his relationship with crew chiefs and field workers as excellent. He stated that "we" provide housing for worker that have been with us for

some years as an incentive and estimated that housing is provided for about one-third of the workers (Tr. 711). Mr. Petrocco estimated that one percent of field workers speak English, that 10% of field workers cannot read Spanish and that 100% cannot read English (Tr. 710.). He testified that he speaks Spanish, but not properly, and said that he converses with field workers and crew chiefs [in Spanish] on a daily basis (Tr. 711).

44. Mr. Petrocco was aware of the Worker Protection Standard (Tr. 712). He confirmed the pesticide safety training given [workers and handlers] by his son, Joe, and identified personal protective equipment furnished to handlers as including masks, goggles, gloves, coveralls and “everything that is required” (Tr. 713). He pointed out that the spray rigs have enclosed Sound Guard cabs with charcoal filters and are extra safe for the applicators who actually apply the pesticides. Referred to the Notice of Warning issued by EPA, dated October 31, 2002 (Exh 2), he denied seeing the letter in October or November of 2001, and testified that he did not see it until after the complaint was filed (Tr. 714-15). To his knowledge, no one at Petrocco Farms received Exhibit 2. Under cross-examination, he testified that, if a letter of this magnitude had reached Joe [Petrocco], it would have reached me (David Petrocco, Sr.), and asserted that “it did not reach us” (Tr. 733).

45. The complaint alleges, inter alia, that on July 15, 2002, Respondent applied Dimethoate and Dithane F45 on a cabbage field, located in “Farm 4”, that cabbage is not listed as one of the crops for which Dithane F45 may be applied and that, therefore, this application constitutes the use of a pesticide in a manner inconsistent with its labeling (Count 19, ¶¶ 38-40); that on July 22, July 24 2002, and August 2, 2002, Respondent applied pesticides including Asana XL on cabbage fields, located in “ Farm 3”, “Farm 1” and Road 10, and that, although the label specifies the maximum rate at which Asana XL may be applied to a cabbage crop is 9.6 ounces per acre, these applications were made at a rate of 32 ounces per acre, thus constituting uses of a pesticide inconsistent with its labeling (Count 91, ¶¶ 104-106 ; Count 102, ¶¶ 116-118 and Count 194, ¶¶ 195-196); and that on August 10, 2002, Respondent applied DiPel DF to an onion field., located in Farm 5, at a rate of three pounds per acre even though the label specifies that the maximum allowable ratio for an onion crop is two pounds per acre (Count 229, ¶¶ 228-230). Mr. Petrocco testified that DiPel is not a pesticide that Petrocco Farms used on onions, because DiPel was [an insecticide] used for worm control and we have no problem with worms eating our onions (Tr.715). He further testified that Dithane was a fungicide and that, while Dithane was used on onions, it would not be used on cabbage, because it would burn and cause crop destruction (Tr. 716). He denied having any such burn or crop destruction incidents in 2002. Referring to Counts 91, 102 and 194 relating to the alleged use of Asana XL on cabbage at a rate of 32 ounces per acre, while the maximum permitted by the label is 9.6 ounces per acre, Mr. Petrocco testified that he could think of no circumstance under which he would put Asana XL [a restricted use pesticide] on a crop at a rate of 32 ounces per acre (Tr. 717). The handwritten applicator’s log (Exh 6-b) reflects that Aseite was applied to Farm No. 3 on July 13, 2002; to Farm No. 5 on July 17, 2002; to Farm No 3 on July 20, and 22, 2002; to Farm Nos. 1 and 3 on July 24, 2002; to Farm No. 5 on July 25, 2002; to Farm Nos. 3 and 14 on July 27, 2002; to Farm No, 10 on August 2, 2002; to Farm No. 4 on August 3, 2002;

and to Farm No. 3 on August 4, 2002. Asked what Asiete was, Mr Petrocco replied that Asiete was a crop oil used as an adjutant or helper to carry or spread the chemical over the leaf better (id.) . For reasons discussed infra, it is concluded that Complainant has not carried its burden of proof as to these counts, that the unit of violation is “use” of a pesticide inconsistent with its labeling for which only one penalty may be assessed and that, in any event these are dependent violations under the ERP for which only one penalty may be assessed.

46. The handwritten applicator’s log covering the period July 12, 2002, through August 4, 2002, indicates that Asiete not Asana XL was applied to cabbage fields at the rate of two pounds” per carga” on Farm Nos.1 and 3, respectively, on July 22, and 24, 2002, (Counts 91 and 102) and at two pounds per acre on Farm 10 on August 2, 2002 (Count 194)¹⁴. These applications correspond to Application Nos.488, 491, and 485 (Exhs 7 and 8). which do not show application of Asiete, but do show application of Asana XL at a rate of two pounds per acre. It is therefore concluded that the mentioned entries showing applications of Asana XL to cabbage at the rate of two pounds per acre are the result of translation or transcription errors in that Asiete, rather than Asana XL, was in fact applied. In addition to the mentioned counts alleging use of pesticides inconsistent with their labeling because applied at a rate or on a crop not permitted by the label, the same applications are included in the counts (Counts 18, 90, 101; and 193), alleging application of pesticides inconsistent with their labeling due to failure to display pesticide application information.

47. EPA issued a press release at the time it issued complaints for alleged violations of the Worker Protection Standard against Petrocco Farms and other vegetable growers in Colorado. Mr. Petrocco pointed out that the press release or bulletin, basically said that Petrocco Farms and other [growers] put workers in harm’s way (Tr. 720). An article entitled “Put ‘in Harm’s Way’ ”, published in the Rocky Mountain News on June 7, 2003, states, inter alia, that EPA is seeking a record penalty of \$231,990 from Petrocco Farms and reports that Petrocco received 229 notices of violation.¹⁵ Mr. Petrocco stated that [because of the publicity] our customers became gravely concerned. He testified that our leading customer told us that if there were any kind of a customer boycott of their stores, we would no longer be able to market product with them and stated that, if that happened, we would basically be out of business (Tr.

¹⁴. Exh 6-b. Presumably “per carga” refers to the tanks or cargo on the tractor or spraying rig. Because there is no evidence of the capacity of the tanks on the sprayer, it is not possible to determine what rate of application “2 P. per carga” represents.

¹⁵. Exhibit B. The article was offered not for the truth of the matters stated, but as illustrative of the potential impact on the company and was admitted over Complainant’s objection (Tr. 722-23). The article quotes an EPA attorney as saying the 229 violations were for keeping the required warnings in a notebook inside the office rather than the posting of signs and that the violations were particularly egregious, because it would not take that much to comply.

721). Mr. Petrocco was particularly incensed at the implication that Petrocco Farms would put any of its workers in harm's way, emphasizing that he has had workers for many years and that there was no way he would put one of his workers in harm's way (Tr. 722). He insisted that it is not going to happen, it hasn't happened, and will never happen. He had no knowledge of any employees of Petrocco Farms ever becoming ill from the application of pesticides and the failure to post the application list in a central location (Tr. 723)..

48. On cross-examination, Mr. Petrocco testified that he had not lost any customers yet [because of the publicity over alleged WPS violations] and that he did not know of any groups which were threatening to boycott Petrocco Farms (Tr. 731, 733). He estimated that the gross income of Petrocco Farms was about \$12 million and that the net income [of the corporation] prior to taxes was \$192,000.¹⁶

49. Dr. Suzanne Wuerthele is the Region 8 toxicologist (Tr. 321). She defined a toxicologist as a person who studies the adverse effects of chemicals on living systems and stated that there were many types of toxicologists (Tr. 322). In her own case, she explained that she studies the adverse effects of chemicals [under] specific exposure scenarios. Dr. Wuerthele has received a bachelor of science degree in biology, a master of arts degree in teaching science and a doctorate in pharmacology; she has worked as a toxicologist for EPA since 1984; has been board certified as a toxicologist by the American Board of Toxicology since 1988 and has testified as an expert in at least 20 cases some of which concerned pesticides (Tr. 324, 325-26, 329). Dr. Wuerthele explained that "we" are assessing not just the hazards of the chemicals and identifying the fact that specific chemicals can cause specific effects, but that we are looking at the risk of those hazards being realized (Tr. 336). She testified that a large part of what she does is risk assessment and that in fact she was considered a national expert in risk assessment. . Dr. Wuerthele was offered and accepted as an expert in toxicology (Tr. 330, 340).

50. Dr. Wuerthele prepared a narrative summary of her proposed testimony (Tr. 342; Exh 53). Although she has not visited Petrocco Farms, she described, from information furnished her, Petrocco Farms as a large, complex operation consisting of eight separate farming areas of from 15 to 350 acres. On these areas what she described as a patchwork of small field plots (generally 2-3 acres) are planted and replanted so that Petrocco Farms may supply product [fresh produce] to its customers throughout the growing season. Dr. Wuerthele prepared Table 1, listing the 22 pesticides used at different times by Petrocco Farms, the percentage of their active ingredients, their toxicity class and their re-entry interval in hours (Tr. 346, 350-51; Exh 53(a)). She testified that the first step in evaluating the toxicity or the toxic potential of these chemicals was to pair the active ingredient with the trade names of the pesticides (Tr. 350-51).

¹⁶. Tr. 731, 734. Complainant's proffer of a Dun & Bradstreet on Petrocco Farms was rejected because it was produced subsequent to the deadline established by the ALJ for the exchange of exhibits and because the WPS Penalty Policy provides that D & B Reports will not be used in FIFRA § 14(a)(2) cases (id. at 7).

This data she obtained from the labels. She also obtained the toxicity class of the pesticides from the labels. She explained that EPA classifies the acute or short-term toxicity of pesticides into three classes, which reflect the potency of the pesticide and which are indicated by signal words on the label (Tr. 352-53). Signal words on the label are “danger”, “warning”, and “caution”, which correspond with Toxicity Classes 1, 2, and 3, respectively. Acute toxicity refers to toxicity which manifests itself shortly after exposure. Toxicity classes are based on the acute inhalation, dermal and oral potency of the pesticide as determined from animal studies (Exhs 53(a) and 53(c)).

51. Dr. Wuerthele pointed out that, although not every pesticide has a re-entry interval, every pesticide used by Petrocco Farms has a re-entry interval (Tr. 352). She testified that [only] pesticides which have sufficient toxicity to cause harm to workers will have re-entry intervals. Toxicological criteria for establishing REIs are based on the degree of acute or chronic effects of the active ingredients of the pesticide. Table 1 prepared by Dr. Wuerthele indicates that the active ingredients in four of the 22 pesticides used by Petrocco Farms are in Toxicity Class 1, active ingredients in seven are in Toxicity Class 2, and active ingredients in the balance are in Toxicity Class 3 (Exh 53(a)). Dr Wuerthele explained that what that tells us is that some of the chemicals used at [Petrocco Farms] have a very serious potential to cause a very serious acute toxicity (Tr. 355). She pointed out that EPA takes that [toxicity] into account in setting re-entry intervals .and that, as a toxicologist, “we” want to make sure that workers are familiar with re-entry intervals.

52. Asked what [in addition to toxicity] REIs were based on, Dr. Wuerthele replied that one of the other factors was the length of time it takes for the pesticide to degrade in the environment (Tr. 355). She pointed out that, if [the pesticide] takes a long time to break down, high concentrations [of the chemical] will remain for a longer period. She explained that the [break-down period] may be effected by factors such as moisture, light, or microorganisms in the soil As an example, she stated that some of the pesticides used by Petrocco Farms are organophosphates such as Lannate which break down by hydrolysis, which means that they are chemically split in water (Tr. 356). She testified that the re-entry period [for organophosphates] is longer when you are working in a dry climate. In this regard, she noted that the average [annual] rainfall in the Denver area was 15 inches, which was considered to be a semi-desert (Tr. 356-57) Although re-entry intervals are not established based upon specific inches of [annual] rainfall, she pointed out some labels provide that if you are working in a dry area, the re-entry interval should be longer (Tr. 357)..

53. Another factor in establishing re-entry intervals is how the pesticide is actually applied. Dr. Wuerthele explained that the workers’ exposure to a pre-emergent herbicide may be different than [exposure] to a pesticide applied [to plants] where workers may brush against

Leaves as they walk through the rows.¹⁷ The table prepared by Dr. Wuerthele indicates that of the pesticides used by Petrocco Farms only one (Di-Syston) has a re-entry interval of 72 hours, four have re-entry intervals of 48 hours, five have re-entry intervals of 24 hours, eight have re-entry intervals of 12 hours and four have re-entry intervals of four hours.¹⁸ Dr. Wuerthele testified, however, that re-entry intervals are based on an average amount of time and that there have been instances of workers being poisoned when they entered a field after the expiration of the re-entry interval (Tr. 360). In addition, she alluded to “hot spots” where extra chemical may have been applied due, e.g., to a malfunctioning valve, or there may have been an extra dry area where the chemical did not break down as quickly. She opined that exposure to chemicals can occur even after the re-entry interval and emphasized that the Agency is never saying that exposure to pesticides is safe (Tr. 360-61).

54. Explaining “chronic toxicity”, Dr. Wuerthele testified that because pesticides are never safe, there can be multiple exposures which are so low that no signs or symptoms are evident, but that pesticides are nevertheless accumulating in the body, which, for example, may cause reproductive or carcinogenic effects (Tr.361). She indicated that these risks are recognized [by EPA] and may result in longer re-entry intervals. Dr. Wuerthele prepared a table which reflects that the pesticides used by Petrocco Farms are in 11 different chemical classes (Tr. 368; Exh 53(b)). She pointed out that the first thing that tells a toxicologist is that there is a broad range of potential health effects due to exposure at Petrocco Farms.

55 Another table prepared by Dr. Wuerthele, “Examples of Chronic Health Hazards of Pesticides Used at Petrocco Farms”, reflects the chemical class, the trade name of the pesticide and the health hazards (Exh 53(d)). As examples of potential adverse effects from such exposures, she cited Pyronyl, Ambush, Asana XL, Ammo and Warrior, pyrethrins and pyrethroids used at Petrocco Farms, which have the potential to cause allergenic responses (Tr.

¹⁷Mr. David Petrocco disclaimed use of herbicides (Tr.718-19). It is not clear, however, whether the disclaimer included pre-emergent herbicides.

¹⁸. Exhibit 53(a). Dr. Wuerthele explained that initially she listed Lannate as having a REI of 72 hours, but because she did not know whether there were separate labels or formulations for this product and she did not wish to be exaggerating, she used the label which listed Lannate as having a REI of 48 hours (Tr.358).

66, 368-69); Proclaim, derived from an antibiotic, for which there is concern about reproductive toxicity, i.e, developmental or birth defects (Tr. 368); Dimehoate, Di-Syston, Lannate, Larvin, and Sevin XLR Plus, which are organophosphates and carbomates, called “cholinesterase inhibitors”, which inhibit an enzyme “acetylcholinestrane”, which is important for the nerve function and may cause neurological problems (Tr. 369) ; Dithane F-45 and Manex which are ethylene bis dithiocarbamates (“EBDCs”), which are toxic to the thyroid and from cumulative exposures may be a thyroid carcinogen (Tr.372); the pesticide “Confirm” is in the chemical class of ‘diacyl hydrazines” and health hazards are blood dyscracias (abnormalities) (id., Tr. 376-77), which she likened to leukemia; and the pesticide “Thiodan” is in the chemical class of “organochlorines” and the health hazards are central nervous system stimulation at massive doses (cardiac dysrhythmias, tremors, disorientation, blurred vision, convulsions); testicular damage(id.; Tr. 379). The pesticides “Dimethoate”, “Di-Syston”, “Lannate”, “Larvin”, and “Sevin XLR Plus” are in the chemical class of “organophosphates” and “carbomates” for which the health hazards are gastrointestinal distress, visual problems, muscle cramps, difficulty breathing, coma; developmental or birth defects (id.). “Avaunt” is in the chemical class of “oxadiazines” for which the health hazards are dermal sensitization (development of allergies (id.; Tr. 380).

56. Dr. Wuerthele read from the preamble to the Worker Protection Standard relating to reported incidents of illnesses or poisoning of agricultural field-workers resulting from exposure to residues of organophosphates in California (Tr. 362-63).She explained that this was the basis for the Worker Protection Standard and that they were reporting instances of symptoms or poisoning many days after working in the fields and after re-entry intervals had expired (Tr. 364). Such incidents indicated that the re-entry interval needed to be lengthened. Asked how workers could use the pesticide-specific information required [to be displayed] by the Worker Protection Standard, Dr. Wuerthele replied that a worker could write down the pesticides to which they have been exposed and which they are working with (Tr. 364). She stated that, if they had symptoms, they could take that information with them to their doctor. She acknowledged that [the worker] may not understand the active ingredient, but that the doctor could contact Poison Control Centers or EPA to ascertain the toxic effects of the pesticide and to assist the physician in diagnosing and treating the symptoms [exhibited by the worker] (Tr. 365). If the worker’s problem is not caused by pesticides, it nevertheless gave that worker an opportunity to understand and to show his physician [the pesticide] to which he has been exposed. Additionally, if a worker has symptoms and easy access to the pesticides to which he has been exposed, he may be able to take that information to his physician or otherwise understand the problem with a pesticide, even if the re-entry interval has expired. Also, according to Dr, Wuerthele, if a worker has knowledge of when a particular pesticide was applied, he can differentiate between a field where the pesticide was applied 29 days ago from a field where the pesticide was applied two days ago (Tr.365-66).

57. Dr. Wuerthele opined that without having access to information [concerning particular pesticides applied at Petrocco Farms] workers have an increased risk of having an acute exposure due to accidentally [reentering a field prior to expiration of the re-entry interval], an increased risk of not understanding the causes of ongoing or recurring illnesses, and an

